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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1433

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, AND JULIAN THOMAS PERNELL,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK MIKA
ARTHUR MEISNERE
MEISNERE & MIKA
1707 L Street, N.W., Suite 560
Washington, D.C. 20036
(202) 296-0993
Attorneys for Petitioners Blackburn, Crocker, Murchison, Pernell, Toombs & Pernell

CARLTON L. WEIDEMEYER
WIGHTMAN, WEIDEMEYER, JONES & TURNBULL
319 South Garden Avenue
Clearwater, Florida 33516
(813) 442-3176
Attorney for Petitioner Maskeny

DAVID KAIRYS
KAIRYS, RUDOVSKY & MAGUIGAN
1425 Walnut Street
Philadelphia, Pennsylvania 19102
(215) 563-8312
Attorney for Petitioners

J. FLOWERS MARK
LOWE, MARK, MOFFITT, FORD & BARTON
216 South Patrick Street
Alexandria, Virginia 22314
(703) 549-0446
Attorney for Petitioner Harvey

JOHN KENNETH ZWERLING
JONATHAN SHAPIRO
ZWERLING & SHAPIRO, P.C.
108 North Columbus Street
Alexandria, Virginia 22314
(703) 836-5551
Attorneys for Petitioner Perkins

Washington, D.C. • THIEL PRESS • (202) 638-4521

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DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, AND JULIAN THOMAS PERNELL,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Maskeny, Harvey, Perkins, Blackburn, Crocker, Murchison, Pernell, Toombs, and Pernell, by their undersigned counsel, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 4, 1980.

OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals has not yet been reported. A copy of the Opinion is appended to this Petition as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals affirming the Judgment of the United States District Court was entered on January 4, 1980. (Appendix B.) The Petitions for Rehearing and Petition for Rehearing with Suggestion for Rehearing *En Banc* were denied on February 14, 1980. (Appendix C.) This Petition is timely filed pursuant to Rule 22(2), Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code § 1254(1).

QUESTIONS PRESENTED

I.

A. IN JURY COMPOSITION CASES, SHOULD A STANDARD BE ESTABLISHED THAT CLEARLY DIFFERENTIATES BETWEEN ALLOWABLE AND IMPERMISSIBLE DEVIATION FROM THE CROSS SECTIONAL IDEAL, AND, IF SO, WHICH STANDARD SHOULD BE ADOPTED?

B. DID THE COURT OF APPEALS ERR BY ESTABLISHING A 10% ABSOLUTE DISPARITY AS A MINIMUM REQUIREMENT FOR A PRIMA FACIE CASE AND BY ADOPTING THE "SUBSTANTIAL IMPACT RULE," BOTH OF WHICH HAVE THE EFFECT OF VALIDATING SERIOUS UNDER-REPRESENTATIONS OF SMALL AND MEDIUM SIZED MINORITIES?

II.

WHETHER THE FAILURE OF THE TRIAL COURT TO COMPLY WITH RULE 30 CAN BE HARMLESS ERROR WHEN PETITIONERS' COUNSEL REASONABLY RELIED UPON THE COURT'S ASSURANCE THAT A REQUESTED JURY INSTRUCTION WOULD BE GIVEN AND COUNSEL WERE, THEREBY, MATERIALLY MISLED IN MAKING THEIR CLOSING ARGUMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

United States Code, Title 28, § 1861.
Juries; Declaration of Policy.

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district court of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

United States Code, Title 28, § 1867(a).
Juries; Challenging Compliance with Selection Procedures.

In criminal cases, . . . the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

United States Code, Title 28, § 1863(b)(2).
Juries; Plan for Random Jury Selection.

Among other things, such plan shall—

specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. . . .

United States Code, Title 18, Federal Rules of Criminal Procedure, Rule 30.
Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. . . .

United States Code, Title 21, § 802(15).
Definitions.

The term "marijuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake or the sterilized seed of such plant which is incapable of germination.

STATEMENT OF THE CASE

Petitioners were convicted in a jury trial before the United States District Court for the Southern District of Georgia in June 1978, of offenses based upon the importation and possession of marijuana in violation of Title 21 United States Code §§ 841(a)(1), 846, 852(a), 960, 963 and Title 18 United States Code § 2.

Prior to the jury being sworn, Petitioners challenged the jury panel as not representative. (Tr. 56.) Petitioners, in the interest of judicial economy, timely moved the court to incorporate into the record the arguments and exhibits supporting the jury challenge made in *United States v. Richard Harrison Lyons*, Docket No. CR 277-12 (United States District Court for the Southern District of Georgia, Brunswick Division). The trial judge granted incorporation without objection from the government and then overruled the Petitioners' challenge. (Tr. 202-203, 393-394.)[1]

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[1] Petitioners' grand and petit juries were both selected from the 1977 revision of the District's jury wheels. In *Lyons*, only the petit jury was selected from the 1977 wheel. The grand jury was selected from the 1973 wheel. Counsel discovered that challenges to the 1977 jury wheels had been brought in *United States v. Auviene D'Agtignac*, Docket No. 278-38 (United States District Court for the Southern District of Georgia, Brunswick Division), *appeal docketed*, No. 79-5007 (5th Cir. Jan. 2, 1979), and *United States v. Michael Thomas Smith, et al.*, Docket No. CR 278-40 (United States District Court for the Southern District of Georgia, Brunswick Division), *aff'd sub nom. United States v. Butler, et al.*, No. 78-5777 (5th Cir. decided Feb. 14, 1980), and moved for incorporation thereof in order that the correct demographic data would be in the record as to Petitioners' grand jury panel. The trial judge granted Petitioners' motion to incorporate, with the

The uncontested evidence in support of the jury challenge showed, *inter alia*, that blacks constituted 29% of the population and 20% of the qualified wheel from which the grand jury was chosen. The Court of Appeals ruled that this disparity was not large enough to establish a prima facie case. The court held that an absolute disparity of 10% is a minimum requirement for a prima facie case and that the "impact" of the disparity was not substantial in terms of the number of black people who would not appear on an average grand jury panel.

At trial, the main defense was that there were several species of marijuana, that the statute only proscribed one of these, Cannabis sativa L, and that the government had not met its burden of proving that the substance in question was Cannabis sativa L, as opposed to one of the other species. Evidence was presented to the jury with the express approval of the trial judge, treating the statutory definition of the Cannabis sativa L as a question of fact.[2] Petitioners' Motion for Judgment of Acquittal was argued based upon the government's alleged failure to prove that the substance was in fact the species of marijuana proscribed by the statute and upon detailed arguments regarding the statutory definition of marijuana.[3] (Tr. 678-687.)

caveat, *inter alia*, that the records be appended to Petitioners' record solely for informational purposes in the Fifth Circuit. (Appendix E.) That these records were so utilized is evidenced by the opinion of that court in Petitioners' case.

[2]There were no relevancy objections either by the government or the court to the numerous questions concerning the polytypic nature of the genus Cannabis propounded by counsel to the chemist testifying on behalf of the government. (Tr. 603-677.)

[3]At the hearing on Petitioners' motion, the court was openly advised by defense counsel of the Fifth Circuit's decision in *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974), authority contrary to Petitioners' grounds for dismissal. (Tr. 681.)

The court denied Petitioners' Motion for Judgment of Acquittal, holding for the purposes of deciding the motion that all species of Cannabis were proscribed by the statute. (Tr. 685.) Contrary to this holding, the court continued to treat the question as if it were a factual matter to be considered by the jury.[4] Petitioners called Dr. Dwight S. Fullerton as an expert witness. The material portion of Dr. Fullerton's testimony related solely to the fact that there are a number of species of cannabis and the differences between them. There were no relevancy objections. (Tr. 721-749, 759-787.)

Counsel submitted three proposed jury instructions, including an instruction consisting basically of the statutory definition of marijuana found in Title 21 United States Code § 802(15).

At a bench conference (not found in the record), counsel requested information concerning the court's proposed action on the requested instructions. The judge rejected only the two proposed instructions not relating to the statutory definition of marijuana. (*See* Tr. 976.)

Based upon this ruling, counsel argued to the jury that:

> His Honor is going to instruct you further later in this case that the law defines marijuana as all parts of the plant Cannabis sativa L. And, he is going

[4]In a subsequent colloquy with Petitioners' counsel, the court stated:

> MR. MIKA: That doesn't mean that we can't still argue it before the jury?
>
> THE COURT: You mean as to whether this is marijuana? Surely you can argue that. In fact, I'm going to charge that unless the government proves beyond a reasonable doubt that that is marijuana as defined in the statute that the defendants will be acquitted. [Tr. 687.]

> to say unless you find beyond a reasonable doubt that the substance in question is marijuana as it is defined in that definition then you must find the defendants not guilty. [Tr. 891.]

The court, in fact, gave the proposed instruction as requested, but went on to add:

> I instruct you that under the law there is only one species of the plant in question, that is to say, marijuana. Marijuana as far as the law is concerned, is not divided into species. [Tr. 960.]

Objection was accordingly made and exception taken to the court's instruction. Judge Lawrence accepted the objection as timely made. (Tr. 976-977.)

The jury found each of the Petitioners guilty. Each Petitioner was sentenced to a period of incarceration and posted an appeal bond.

An appeal was timely filed in the United States Court of Appeals for the Fifth Circuit. The panel opinion was entered on January 4, 1980. (Appendix A.) The Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on February 14, 1980. (Appendix C.)

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT OF APPEALS DENYING THE JURY COMPOSITION CHALLENGE RAISES IMPORTANT FEDERAL QUESTIONS CONCERNING WHICH THERE IS A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

The court of appeals has adopted standards concerning jury composition challenges that seriously undermine the

representativeness principle and conflict with decisions of other courts of appeals, with earlier decisions of the Fifth Circuit, and with the import of decisions of this Court.

First, the court adopted the "absolute disparity" standard as the measure of representativeness and held that at least a 10% absolute disparity is necessary to establish a prima facie case. Second, the court adopted the "substantial impact rule," whereby even a very large and unexplained underrepresentation is allowed if it does not have a large impact in terms of the number of persons in the underrepresented group who do not appear on a regular panel.

Both of these standards have the effect of legitimizing substantial underrepresentations of small and medium-sized minorities (those below about one-third of the population). Moreover, they deeply contradict the compelling constitutional and policy basis for stringent jury representativeness standards. Unlike claims of underrepresentation in other institutions, jury underrepresentations not only harm the group underrepresented but also affect the right of defendants to a fair trial and undermine the legitimacy, integrity and impartiality of the judicial system. *Rose v. Mitchell*, 99 S. Ct. 2993 (1979); *Duren v. Missouri*, 439 U.S. 357 (1979); *Castaneda v. Partida*, 430 U.S. 482, 492-93 (1977); *Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 266 n.13 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

This Court has not adopted a specific standard of representativeness. There is considerable conflict and confusion on this question in the lower courts, and the lack of concrete standards has contributed to a marked

increase in the number of challenges to federal and state jury systems.[5] Particularly after *Duren*, where the Court clearly established the fact of underrepresentation rather than the intent of jury selection officials as the crucial issue in Sixth Amendment challenges, it is vital that courts, litigants and court administrators be provided with standards that differentiate between allowable and impermissible deviations from the cross-sectional ideal.

The following table presents a summary of the uncontested evidence on the underrepresentation of black people in the grand jury pool in this case.[6] The first and second columns present the basic demographic data, and the third through fifth columns present the corresponding values for the most commonly referred to standards of representativeness.[7]

[5] *See* Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States 9 (April 7, 1976); Hearing before the Subcommittee on Improvements in the Judicial Machinery of the Committee on the Judiciary on Bill Nos. S. 2072, S. 2074 and S. 2075, U.S. Senate, 95th Cong., 1st Sess. (September 26, 1977). The lack of concrete standards results in more challenges because litigants are thereby encouraged to bring a challenge whenever there is an underrepresentation. Establishment of specific standards would mean that challenges would be futile except where those standards have been violated.

The major underlying factor contributing to the increase in the number of challenges is the increasing unrepresentativeness of voter lists resulting from the steadily declining proportion of the population that registers to vote. *See* Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776 (1977).

[6] The petit jury pool was also challenged as unrepresentative of blacks. The disparity was not quite as large (blacks were 31% of the population and 24% of the pool), so the discussion herein has been limited to the grand jury challenge for simplicity. There were also challenges not discussed here based on underrepresentations of other groups.

[7] The data have been rounded off for simplicity.

Data		Standards of Representativeness		
Proportion of Population (%) (1)	Proportion of Qualified Wheel (%) (2)	Absolute Disparity (%) (3)	Comparative Disparity (%) (4)	Standard Deviations (5)
29	20	9	31	3.6

The standards of representativeness are defined as follows:

(a) The *absolute disparity* is the difference between the proportions of the population and the qualified wheel that are in the underrepresented category. Here, it is: 29% - 20% = 9%.

(b) An elementary mathematical statement of the cross-sectional legal principle is that in a fair, cross-sectional system, the probability of any eligible person being selected is the same for every eligible person, regardless of race, sex, age, or socioeconomic status. The *comparative disparity* is the proportion by which the probability of serving is reduced for people in the underrepresented category. It is calculated by dividing the absolute disparity by the proportion of the population that is in the underrepresented category. In this case, it is: $\frac{29\% - 20\%}{29\%} = 31\%$. This means that an eligible black person, because he or she is black, has 31% less chance of serving than the average eligible person.

(c) The *statistical significance test* measures representativeness by calculating the probability of the disparity occurring by chance. If that probability, expressed in terms of standard deviations here, is very low, the

conclusion is drawn that the disparity is not the result of chance but results from discrimination.[8]

On these standards, *see generally* Circuit Judge Walter P. Gewin's Appendix to the Opinion in *Foster v. Sparks*, 506 F.2d 805, 811-37 (5th Cir. 1975) (hereinafter "Foster Appendix"); Kairys, Kadane & Lehoczky, *Jury Representativesness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776, 788-99 (1977) (hereinafter "Jury Representativeness"); J. VanDyke, *Jury Selection Procedures*, at 95-98 (1977) (hereinafter "Jury Selection Procedures"); Finkelstein, *The Application of Statistical Decision Theory to Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

The court of appeals explicitly adopted the absolute disparity standard and held that at least a 10% absolute disparity is necessary to prove a prima facie case. This is the first court of appeals decision that clearly and exclusively adopts one of the standards.[9]

This Court has referred to and used all three standards without specifically adopting any one of them. The absolute disparity standard was relied on in *Swain v. Alabama*, 380 U.S. 202 (1965), but the Court's recent decisions emphasize the statistical significance test. *Rose v. Mitchell*, 99 S. Ct. 2993 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 629-30, 630 n.9 (1972) (statistical significance

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[8]The probability corresponding to the underrepresentation of blacks is 0.00016. This means that the odds against this underrepresentation occurring by chance in a random selection from the population are about 6,000 to 1.

[9]The court of appeals reaffirmed this holding in *United States v. Butler*, 5th Cir., No. 78-5777 (Feb. 14, 1980), which is based on the same evidentiary record as this case.

test and comparative disparity emphasized); *Whitus v. Georgia*, 385 U.S. 545, 552 n.2 (1967).

There is considerable conflict and confusion on this question in the decisions of the various circuits and in the decisions of various panels within several of the circuits. Most of the circuits have, like this Court, referred to and used all three standards without specifically adopting any one or explicitly addressing the issue. Prior to this case, the Fifth Circuit had recently emphasized the comparative disparity. *Berry v. Cooper*, 577 F.2d 322, 326 n.11 (5th Cir. 1978); *United States v. Goff*, 509 F.2d 825, 826-27 & n.3 (5th Cir.), *cert. denied*, 423 U.S. 857 (1975). The Eighth Circuit's decisions are also split. *E.g., Ross v. Wyrick*, 581 F.2d 172, 174 n.6 (8th Cir. 1978) (comparative and absolute disparities); *United States v. Whitley*, 491 F.2d 1248 (8th Cir. 1974) (comparative disparity); *Murrah v. Arkansas*, 532 F.2d 105 (8th Cir. 1976) (absolute disparity). The Fourth Circuit has used the absolute disparity but emphasized the comparative disparity in one of its leading recent cases, *Stephens v. Cox*, 449 F.2d 657 (4th Cir. 1974). *See also Quadra v. Superior Court*, 403 F. Supp. 486 (N.D. Cal. 1975) (comparative disparity); *Ford v. Hollowell*, 385 F. Supp. 1392 (N.D. Miss. 1974) (comparative disparity).[10]

Most recent commentators favor the comparative disparity. *See Jury Representativeness*, at 793-99; *Foster Appendix*, at 834-35; *Jury Selection Procedures*, at 92-98. This preference is based on the following considerations.

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[10]The Ninth Circuit has adopted the substantial impact rule as an overall standard. *See* discussion *infra*.

First, the absolute disparity fails to account for the range at which the disparity occurs. An absolute disparity of 10% in a jurisdiction that is 50% black is quite different from the same absolute disparity in a jurisdiction that is 11% black; in the latter jurisdiction, the 10% absolute disparity amounts to almost total exclusion.

Second, by definition, the maximum absolute disparity there can be as to any minority is its proportion of the population. Thus, there can *never* be an absolute disparity of more than 10% as to any minority that is 10% or less of the population, and the standard adopted by the court of appeals seems to validate even total exclusion of such minorities. This problem was noted by the court of appeals and left for resolution in a case where the minority is less than 10% of the population. However, neither the operation of the absolute disparity standard in this range nor the basic fact that it also validates serious underrepresentations of medium-size minorities (from 10% up to about one-third of the population) were addressed or evaluated concerning the court's decision to adopt the absolute disparity standard.

Third, the statistical significance test, while preferable to the absolute disparity, involves complicated calculations and results that are difficult to visualize or evaluate, and it is significantly affected by the choice of the sample size used to determine the composition of the jury pool.[11]

[11] In this case, 352 questionnaires were sampled to determine the racial composition of the qualified wheel, and the probability corresponding to the underrepresentation of blacks was 0.00016, or odds of about 1 out of 6,000. If the sample size were doubled, the probability corresponding to the same disparity would be about 0.0000001, or odds of 1 out of 10 million. The statistical significance test suffers from the contradiction that the more sure we are of the composition of the pool (because of a larger sample size), the more significant a given disparity appears. *See Jury Representativeness*, at 794 n.101.

The comparative disparity standard avoids these defects and is conceptually valid, easily calculated, and intuitively used and understood. It focusses on and translates into quantitative terms the underlying constitutional principle: that fairness to litigants, the right of all our citizens to serve on juries, and the legitimacy, integrity and impartiality of the judicial system require that no cognizable group be substantially underrepresented.

The court of appeals also adopted the "substantial impact rule." The "impact" is defined as the number of people in the underrepresented group who, on the average, will not appear on a panel of a given size due to the disparity in representation. Here, on the average, a grand jury panel should have been 29% black, but was only 20% black due to the disparity. The "impact" of the disparity was 9% of 23 (the panel size), or 2.1. This means that on the average a panel of 23 will have 2.1 less black people than it should.

The court of appeals held that, even if an underrepresentation is significant, it does not establish a prima facie case if it results in an insubstantial impact and ruled that an impact of 2.1 people on a panel of 23 is not substantial.

The Fifth Circuit had earlier adopted this rule in *United States v. Goff, supra,* and then cast doubt on it in *Berry v. Cooper,* 577 F.2d at 326 n.11. *See also Abdul v. Lane,* 468 F. Supp. 33 (D.C.D. Tenn. 1978), *aff'd,* 588 F.2d 1178 (6th Cir. 1978). Other courts of appeals have adopted the rule. *United States v. Kleifgen,* 557 F.2d 1293, 1297 (9th Cir. 1977); *United States v.*

Potter, 552 F.2d 901, 906 (9th Cir. 1977); *United States v. Test,* 550 F.2d 577 (10th Cir. 1976); *United States v. Jenkins,* 496 F.2d 57, 64 (2d Cir. 1974). No other court has found an impact as big as 2.1 on a panel of 23 to be insubstantial.

Although the impact purports to shed some additional light on the significance of a disparity, it is just another way of expressing the absolute disparity. The impact is the absolute disparity multiplied by the size of the panel. And since it adds another variable, the panel size, it confuses rather than enlightens. The smaller the panel size, the smaller the impact of a given disparity.[12] For example, if the district court in this case were using grand jury panels of 50, the impact of the same disparity would be 4.5 rather than 2.1. The *Jenkins* court found insubstantial an impact of one juror on a panel of 60, while the *Goff* court found insubstantial an impact of one juror on a panel of 23 (which is equivalent to almost three on a panel of 60). Panel sizes vary greatly in our various courts and are regularly modified according to the expected requirements in particular cases.

The impact amounts to a rather confusing method of restating the absolute disparity, suffers from the same disadvantages as that standard, and adds a new and arbitrary variable, the panel size. *See Jury Representativeness,* at 799-801.

The absolute disparity standard and the substantial impact rule raise serious constitutional, statutory and policy questions. The unavoidable effect of both is to

[12]Use of small panel sizes could, under the substantial impact rule, serve to defeat almost all composition challenges, including many that have been upheld by this Court.

validate discrimination against and serious underrepresentation of small- and medium-sized minorities, those "discrete and insular minorities" that the Court long ago described as

> "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

None of the courts adopting these standards refers to any authority for the proposition that the Constitution only prohibits underrepresentations of large as opposed to small- or medium-sized minorities, or that the exclusion of even one minority juror is insignificant. *See Davis v. Georgia,* 429 U.S. 122 (1976). *See also Jury Representativesness,* at 800-801, 801 n.133; *Jury Selection Procedures,* at 33. Nor has any court provided a reasonable explanation for failing to even require the government to explain serious underrepresentations of small- and medium-sized minorities—a rather minor burden on the government compared to this fundamental right that benefits society and litigants as well as underrepresented minorities. In this case, eligible blacks have over 30% less chance of being selected for jury service than the average eligible person, and the government should at least be required to explain the disparity.

In addition to the importance of the decision of the court of appeals and the particular standards it adopted, there is a real need for uniform standards established by this Court. Court administrators attempting to abide by constitutional and statutory mandates are presently unable to determine whether their jury selection systems

are adequate or must be improved.[13] Litigants are unable to determine whether a challenge has merit, which tends to encourage a larger number of challenges than is necessary. Courts, faced with these challenges, are applying contradictory and often confused standards.[14] Particularly after *Duren,* uniform standards are needed.

II.

THE DECISION OF THE COURT OF APPEALS DENYING PETITIONERS' RULE 30 CLAIM RAISES IMPORTANT FEDERAL QUESTIONS CONCERNING WHICH THERE IS A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

Rule 30 has no express guidelines for its application. The Rule instructs, however, that the trial court shall

[13] For example, 28 U.S.C. § 1863(b)(2) requires that voter lists be supplemented if they are not representative of a cross section of the community (which petitioner claimed in this case). The exclusive use of voter lists has led to an increase in challenges as voter lists have become less representative. Most courts have held that nonvoters are not a cognizable group. However, the exclusive use of voter lists has resulted in significant underrepresentations of other, clearly cognizable groups, and Congress has recently defeated a proposed amendment to § 1863(b)(?) that would have created a presumption that voter lists are adequate. New methods for easily and cheaply using multiple lists have been developed, and many courts have adopted them. *See* authorities in note 1, *supra* and the statement of the Justice Department opposing the proposed amendment to § 1863(b)(2), Hearing before the Subcommittee on Improvements in the Judicial Machinery of the Committee on the Judiciary on Bill Nos. S. 2072, S. 2074 and S. 2075, U.S. Senate, 95th Cong., 1st Sess. 100-101 (September 26, 1977). The lack of concrete standards of representativeness leaves federal court administrators without guidance concerning how large an underrepresentation must be to require supplementation.

[14] For example, in *Figueroa v. Commonwealth of Puerto Rico,* 463 F. Supp. 1212, 1215 (D.P.R. 1979), decided after *Duren,* the

inform counsel of its proposed action upon requested instructions prior to their arguments to the jury. This Court has read into Rule 30 a standard which in "some manner" examines the prejudice to the defendant in deciding whether reversal is required, when there has been strict compliance with the Rule. *Hamling v. United States,* 418 U.S. 87, 135 (1974). The courts of appeals have taken opposite approaches to the question of what type of prejudice affects a defendant's substantial rights. Rule 52(a), Federal Rules of Criminal Procedure. Different panels within the same circuit have likewise reached disparate results.

The Ninth Circuit is the only circuit that has articulated a consistent standard for deciding substantial prejudice to a defendant where Rule 30 is violated by the trial judge's failure to correctly inform counsel requesting information concerning his instructions to the jury. The Ninth Circuit standard for the measure of prejudice, which is the preferred test, examines the misleading effect on the content of counsel's argument, "not the soundness of the ruling."

In *Wright v. United States,* 339 F.2d 578 (9th Cir. 1964), the trial court failed to clearly inform counsel of its ruling on requested jury instructions. Counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent instructions. The appeals court concluded that this was sufficient to impair the effectiveness of counsel's argument and, hence, of appellant's defense. *See* Rule

court found insubstantial an underrepresentation of women where the absolute disparity was 17% and the comparative disparity was over one-third. The court based this determination on a comparasion to the 39.5% absolute disparity in *Duren,* which corresponds to a comparative disparity of over 75%.

52(a). The court held that the failure of the trial court to comply with Rule 30 prejudicially affected the content of counsel's argument.

> It was the court's failure to advise counsel of its ruling prior to closing argument, *not the soundness of that ruling,* which violated Rule 30 and prejudicially affected counsel's summation. [Emphasis added.] 339 F.2d at 580.

Similarly, in *United States v. Harvill,* 501 F.2d 295 (9th Cir. 1974), the court rejected the government's argument that the outcome of the trial would not have been affected, even if counsel had known the court's actual instructions prior to making his argument to the jury, stating that "[w]hether the requested instructions were faulty is irrelevant." 501 F.2d at 296. *Accord, United States v. Kroncke,* 459 F.2d 697 (8th Cir. 1972); *Ross v. United States,* 180 F.2d 160 (6th Cir. 1950).

The rule in the Ninth Circuit was followed by the Fifth Circuit in *United States v. Mendoza,* 473 F.2d 697 (5th Cir. 1973), and was apparently the rule in that circuit until the panel decision in Petitioners' case. *See also Steinberg v. United States,* 162 F.2d 120 (5th Cir.), *cert. denied,* 332 U.S. 808 (1947).

The Tenth Circuit focused on the effect which the court's misleading indications had on the contents of counsel's argument, not on the outcome of the trial. This standard for reversal, frequently applied, is:

> . . . whether the party was unduly and unfairly prevented from making his argument to the jury or was substantially misled by the court's actions or inactions in formulating his arguments. *Whitlock v. United States,* 429 F.2d 942, 946 (10th Cir. 1970).

Accord, United States v. Pommerening, 500 F.2d 92, 101 (10th Cir.), *cert. denied,* 419 U.S. 1088 (1974), *reh. denied,* 420 U.S. 939 (1975).

The Sixth Circuit, in *Ross v. United States,* similarly emphasized the deleterious effect of the failure to follow the Rule even where two of the special requests which the court rejected were incorrect in law.

This standard has not been uniformly applied. For example, the Seventh Circuit in *United States v. D'Argento,* 373 F.2d 307 (7th Cir.), *cert. denied,* 389 U.S. 833 (1967), concluded that the failure of the trial court to inform counsel of its proposed action upon requested instructions is not reversible error when "the jury was sufficiently and properly instructed." 373 F.2d at 314.

The Tenth Circuit decision in *United States v. Newson,* 531 F.2d 979 (10th Cir. 1976), also adopted a strict harmless error approach and found no prejudice since the instruction given was not a misstatement of the law.

A similar approach was taken in the decision of the District of Columbia Circuit in *Walker v. United States,* 418 F.2d 1116 (D.C. Cir. 1969). The actual prejudice to the defendant was considered negligible, even assuming error under Rule 30 because of the strength of the government's evidence.

Still another approach was taken by a Fifth Circuit panel in *United States v. Scheffer,* 463 F.2d 567 (5th Cir.), *cert. denied,* 409 U.S. 984 (1972), a Third Circuit panel in *United States v. Hartman,* 409 F.2d 198 (3rd Cir. 1969), and a District of Columbia Circuit panel in *Loveless v. United States,* 260 F.2d 487 (D.C. Cir. 1958). These panels indicated that where there is a technical failure of the trial court to comply with Rule 30, the measure of prejudice depends vaguely upon whether the

instruction, considered as a whole, was fundamentally prejudicial to the rights of the defendant.

Without reference to Fifth Circuit precedent, the decision in Petitioners' case impliedly followed the general standard for prejudice found in *United States v. D'Argento*, *United States v. Newson*, and *Walker v. United States*. The panel's paltry treatment of Petitioners' Rule 30 argument was based entirely upon its conclusion that "the District Court should not have entertained, or allowed, the protracted contentions of the defense to the effect that the marijuana taken from the captured plane was of 'a species' different to [*sic*] Cannabis sativa L."[15] (Appendix at 10a.) The court further stated:

> The vigorous arguments on behalf of this theory and as to the jury instructions sought with reference to it must be rejected. *Id.*

The sole basis for rejecting Petitioners' Rule 30 argument was the court's apparent estimation that the instruction given was a correct statement of the law. The panel gave no consideration to the fact that counsel was substantially misled, as was plain from the record, in presenting their defense and arguing to the jury. Thus, the decision of Petitioners' Rule 30 claim depended upon which of the conflicting panels decided Petitioners' appeal.

The total absence of a consistent standard for evaluating the prejudice to a defendant when there is a Rule 30 violation has fostered irreconcilable results within and among the federal circuits. The result of these disparate standards is the absence of any reliable standard against which counsel can measure how much reliance he can

[15] Petitioners do not concede that the defense should not have been allowed, notwithstanding the decision in *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974).

place upon the anticipated jury instructions when he formulates his closing argument to the jury.

The continued failure to articulate a uniform standard reduces to a constitutionally impermissible level the ability of counsel to make his closing argument based upon what he reasonably understands the law of the case to be. Counsel's argument will either be more timid and less effective, or counsel will risk having his closing argument undercut by the judge's subsequent instructions. The absence of a standard impinges upon every federal defendant's Sixth Amendment right to effective assistance of counsel.

CONCLUSION

For the reasons stated, petitioners pray that this Court issue a Writ of Certiorari.

Respectfully submitted,

DAVID KAIRYS
KAIRYS, RUDOVSKY & MAGUIGAN
1425 Walnut Street
Philadelphia, Pennsylvania 19102
Attorney for Petitioners

J. FLOWERS MARK
LOWE, MARK,
MOFFITT, FORD & BARTON
216 South Patrick Street
Alexandria, Virginia 22314
Attorney for Petitioner Harvey

JOHN KENNETH ZWERLING
JONATHAN SHAPIRO
ZWERLING & SHAPIRO, P.C.
108 North Columbus Street
Alexandria, Virginia 22314
Attorneys for Petitioner Perkins

FRANK MIKA
ARTHUR MEISNERE
MEISNERE & MIKA
1707 L Street, N.W., Suite 560
Washington, D.C. 20036
Attorneys for Petitioners Blackburn, Crocker, Murchison, Pernell, Toombs & Pernell

CARLTON L. WEIDEMEYER
WIGHTMAN, WEIDEMEYER,
JONES & TURNBULL
319 South Garden Avenue
Clearwater, Florida 33516
Attorney for Petitioner Maskeny

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-5596

Jan. 4, 1980

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, TONY DARWIN and JULIAN THOMAS PERNELL,
Defendants-Appellants.

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* * *

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Before COLEMAN, Chief Judge, TJOFLAT and Hill, Circuit Judges.

COLEMAN, Chief Judge.

Somewhere around 10 o'clock, P.M., March 6, 1978, Pilots (appellants) Darwin and Maskeny, accompanied by

defendant Perkins, landed a twin engined airplace at the Sylvania, Georgia public airport, loaded with 3,623 pounds of marijuana. They were met with an entirely unexpected welcome from United States Customs Agents and Georgia state officers who had been awaiting their arrival.

The other defendants (appellants), also expecting the arrival, had stationed themselves and their trucks in the adjacent woods. They rushed to the plane and quickly transferred the cargo, after which they set out for Washington, D.C., only to be intercepted by other officers who had been waiting down the road. No ambush was ever more successfully laid or executed.

This happened because from the outset some of the participants unwittingly had been dealing with an undercover government agent who had been kept informed of everything that went on. Indeed, these conspirators were so gullible that an agent had no difficulty in leading them to believe that *he* was the owner of the publicly owned Sylvania airfield. While most everybody has heard of wooden nutmegs and of the Brooklyn Bridge, two of the conspirators actually paid the agent $2,000, cash in advance, for the privilege of landing their clandestine cargo on "his" airfield.

The defendant who had initiated the scheme with the government agent, and who handed over the $2,000 supplied by one of the others, quickly saw that he was irretrievably caught in the jaws of the lion, so he pleaded guilty. He testified for the prosecution, corroborated everything that the agent had sworn to, and wobbled only as to whether it was in November or December that he had received his first contact from one of the other conspirators, an immaterial matter in light of the evidence in the case. Defendant Krainee also pleaded

guilty. The proof was annihilating but the remaining ten men stood trial to a jury. They were represented by skilled and tenacious trial counsel, who generated towering columns of smoke despite the absence of useful combustibles. Whatever else may be said of this case, the defendants did not suffer for the lack of counsel who were both competent and energetic.

The presence of so many defendants and so many lawyers generated a bloated trial record. After oral argument and an exploration of that record we are altogether convinced that the judgment of the District Court must be affirmed.

Darwin, Maskeny, Meycher, Perkins, Julian Thomas Pernell, Sidney Larry Pernell, and Barry Wayne Toombs were indicted for conspiracy to import 3,623 pounds of marijuana from outside the United States. The indictment further charged that when the contraband arrived, Blackburn, Crocker, Harvey, Krainee, Meycher, Murchison, the two Pernells, Toombs, Darwin, and Maskeny participated in unloading the marijuana from the aircraft.

Count 2 charged Darwin, Maskeny, Meycher, Perkins, the two Pernells, and Toombs with importation and causing importation.

Count 3 charged all defendants with conspiring to possess with intent to distribute, while Count 4 charged all named defendants with actual possession with intent to distribute.

The relevant statutes are: 21 U.S.C., Sections 841(a)(1), 846, 952(a), 960, and 963; 18 U.S.C., Section 2.

All defendants were found guilty on all charges.[1]

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[1]Stated in abbreviated form, the sentences imposed were as follows:

[footnote continued]

On January 7, 1978, William A. Wallace, Jr., an employee of the United States Customs Service, met at the Savannah airport with Jesus Manuel Meycher (who later pleaded guilty), Barry Wayne Toombs, Julian Pernell, and Frank Landry. Landry, an airplane pilot and locator from Florida, had informed Wallace that some people were interested in finding a clandestine air landing strip in Georgia, that these people would be in Savannah on January 7, and wondered if Wallace could get together with them and show them such an airfield. Wallace pretended to be the owner, in full control, of the Sylvania airport. The boundary lights could be turned on and off; "we knew the area including backroads". GBI Agent Claude Clardy went with Wallace and the others on the exploratory trip to the Sylvania airfield, about a ninety minute drive from Savannah. Meycher, Toombs, Pernell, and Landry pronounced the field satisfactory after a ten minute observation. They returned to Savannah.

Meycher asked Wallace if he could come down to Miami the next day to pick up the $2,000 "good faith" money, giving him $200 with which to purchase the airline ticket. Wallace went to Miami, where he met

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Darwin—36 months; 4 years special parole.

Maskeny—30 months; 4 years special parole.

Toombs and Sidney Larry Pernell—a year and a day. Supervised probation 4 years.

Julian Thomas Pernell—6 months; $5,000 within 1 year; supervised probation for 3 years; special parole term 2 years.

Murchison—6 months. Special parole term 4 years. Supervised probation 3 years.

Harvey and Mark Perkins—6 months; 4 years special parole.

Crocker—6 months; special parole 3 years.

Blackburn—Sentence suspended; supervised probation 3 years.

with Meycher, Julian Pernell, and Larry Pernell, and got the $2,000. At the first meeting, the parties informed Wallace that the aircraft *would be coming from Colombia.* It would be a large four engine type airplane, probably a DC-6, and would be transporting approximately 20,000 pounds of marijuana. They needed nothing from Wallace but the clandestine airstrip. Julian Pernell said that they had their own trucks, that they would be using two twenty foot sealed vans. They would have drivers in uniforms and bills of lading in case they hit a roadblock.

At Meycher's invitation, Wallace was back in Miami on March 3, where he met Meycher at the Marriott Hotel in a meeting that was surveilled by two DEA Agents. Meycher said that the 20,000 pound airplane deal had fallen through but a smaller airplane would be coming in, wishing to know if Wallace had any objections to that. Of course, Wallace had none. He gave Meycher a previously requested aviation chart for the Sylvania airfield and Meycher asked him to call him later. No other defendant was present at this meeting.

Wallace talked to Meycher by telephone on March 4. Meycher said that "the deal was set" and that they wanted to go ahead with it on Monday or Tuesday. At approximately midnight on March 5 Wallace was again in touch with Meycher at Howard Johnson's in Savannah, who asked Wallace to meet him the next morning, saying that everybody was in town.

That next morning, Wallace and GBI Agent Clardy met with Meycher at the Howard Johnson, where Meycher again said that everybody was in town, that the deal was set to go that night. After breakfast, Meycher, Wallace, and Clardy went across the street to the Ramada Inn and met Julian Pernell and Barry Toombs. All five men got in a rental car and drove around "to further discuss the

deal". Julian Pernell at that time stated that the DC-6 deal was off, that they had a smaller twin engine aircraft that would be coming into the field. Julian Pernell said that they had four pickup trucks at various motels "so they would not draw heat", that they were of the four wheel drive type which would be used to transport the load from the airfield. Toombs said that the load was going to Washington. As the parties drove back in at the Ramada, Julian Pernell pointed out one of the vehicles.

During the ride there was some discussion that the aircraft would be in between 9 and 10 o'clock that night.

At that point Toombs, Pernell and Meycher were dropped off.

At 5 o'clock that afternoon Meycher, Julian Pernell, and Toombs met with Wallace and Clardy at the Ramada Inn restaurant. At 6 o'clock the parties left for the Sylvania airfield. Barry Toombs went to Sylvania with Customs Agent Wallace in an undercover GBI truck, followed by Julian Pernell, driving another truck. Upon arrival at Sylvania another truck was already present, in the woods about a half mile from the runway. There were four 4 wheel drive pickup trucks at the scene, equipped with camper shells and CB radios.

As the marijuana laden aricraft approached the airport it announced its approach on the UNICOM located inside the "terminal". Those present at the hangar area were Clardy, defendant Harvey, defendant Meycher, and defendant Larry Pernell. The trucks were brought in and "everybody except Darwin and Maskeny were loading the vehicles". Perkins and Harvey passed the bales out. The aircraft was unloaded. Perkins and Harvey vacuum cleaned the interior, during which time Customs Agent Wallace heard Perkins say "*I just made a*

long trip from Colombia and I want to get out of here". (Vol. 1, p. 252)

While the others started off in the trucks Darwin, Maskeny, Harvey, and Perkins remained with the aircraft, after which they were arrested and taken inside the terminal.

The defendant, Jesus Meycher, who had been conducting the arrangements with Agent Wallace and who later pleaded guilty was thirty-two years old, an American citizen, resident of Tucson, Arizona, a high school graduate, with a year of school in Mexico.

The government agreed to recommend probation in return for his testimony. He pleaded guilty to two counts.

According to Meycher, in December, 1977, in Tucson, he was contacted by the defendant Barry Toombs, who needed an airplane to smuggle marijuana from Colombia to the United States. He was to be paid $80,000 to get the plane and the pilots. He met Barry Toombs and Julian Pernell in Miami, Florida, in January, 1978, whence he had gone to look for a big airplane. He had gone to see "Frank" (Landry). He also discussed a landing place in the United States with Frank Landry. Landry, Pernell, and Toombs accompanied Meycher to Savannah, where they met Clardy and Wallace. Wallace claimed to be the owner of the airport and Clardy was its manager. Meycher informed them that he needed a 4600 foot paved runway. Wallace had taken them to the Sylvania airport, where they checked the runway, the hangar, and the back road. The airfield was satisfactory to Pernell and Toombs.

On January 8 he gave Wallace $200 in Savannah to get to Miami. Along with Landry, Meycher met Wallace at

the Marriott Hotel in Miami and paid Wallace $2,000 as good faith money. He got the money from Julian Pernell. Julian Pernell had given Meycher $10,000 on January 8 at a time when Larry Pernell was present. Meycher gave the remainder of the money to Frank Landry as a good faith deposit on the plane they were trying to obtain. He confirmed that Wallace gave him the aerial chart of the Sylvania airport. He did not know all of the members of the conspiracy until they were arrested in Sylvania.

On the day the plane was to arrive in Sylvania, Julian Pernell said the lighter plane would be able to land in Colombia.[2]

Along with Larry Pernell and GBI Agent Clardy, Meycher went to Sylvania to await the arrival of the marijuana plane. When the plane arrived, Perkins jumped out and the trucks started arriving. He saw the pilots and one of them had a brief case (Vol. 2, p. 336). After the marijuana had been off-loaded into the trucks, everybody helping but the pilots, Meycher left the airfield with the Pernell brothers and Toombs, but they were arrested when they got to the paved road.

THE ATTEMPTED DEFENSES

In *United States v. Gaines,* 489 F.2d 690 (1974), we held as follows:

> "Noting that the federal statutory definition of marihuana refers only to Cannabis sativa L., Gaines

[2]Landry testified that he had flown to Colombia to look at the airstrip on which the DC-6 was to land to pick up the marijuana. He concluded that no DC-6 could land on that strip. That was what "blew up" the DC-6 plan, resulting in the use of the lighter aircraft. Landry declined to go back to Colombia in any event.

> calls our attention to the fact that while the Government's expert chemist agreed that there are three species of marihuana, i.e., Cannabis sativa L., Cannabis indica and Cannabis ruderalis, the chemist was unable to differentiate between the three. Building upon the premise that Cannabis sativa L. is the only species of marihuana expressly prohibited by statute, Gaines argues that the court's refusal to give the jury an instruction containing the statutory definition of marihuana deprived the jury of considering whether the Government's expert was sufficiently trained and whether he sufficiently tested the substance to prove beyond a reasonable doubt that in fact the substance examined was Cannabis sativa L. and not Cannabis indica.
>
> "The Third Circuit recently considered the issue raised by Gaines and concluded that Cannabis indica is included within the statutory definition of marihuana. *United States v. Moore,* 3 Cir., 1971, 446 F.2d 448. Similarly, the Second Circuit, while recognizing the possibility that there may be some botanical opinion that Cannabis is polytypal, found that there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana. . . . Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions. *United States v. Rothberg,* 2 Cir., 1973, 480 F.2d 534, 536.
>
> "We are in full agreement with what has been said by our sister Circuits, and thus find no error in the district court's refusal to instruct the jury with respect to the statutory definition of marihuana."

This view is supported by the following cases: *United States v. Honneus,* 1 Cir., 1974, 508 F.2d 566; *United*

States v. Gavic, 8 Cir., 1975, 520 F.2d 1346; *United States v. Kelly*, 9 Cir., 1976, 527 F.2d 961; *United States v. Spann*, 10 Cir., 1975, 515 F.2d 579; *United States v. Walton*, D.C. Cir., 1975, 168 U.S. App. D.C. 305, 514 F.2d 201.

Therefore, the District Court should not have entertained, or allowed, the protracted contentions of the defense to the effect that the marijuana taken from the captured plane was of "a species" different to Cannabis sativa L. The vigorous arguments on behalf of this theory and as to the jury instructions sought with reference to it must be rejected.

The same must be said of the controversy which continuously and lengthily swirled around the warrantless search of a briefcase found on a counter inside the airfield "terminal" at a time when the pilots were present and after they had been arrested and given their *Miranda* warnings. GBI Agent Clardy testified that he saw Pilot Darwin carrying a briefcase when he got off the plane. The customs agent who first noticed a briefcase on the counter and seized it testified on a motion to suppress that when she inquired as to whom the briefcase belonged to everybody remained silent. Another witness testified that the defendants said that it did not belong to them. Much time was spent on whether the defendants were required to say anything when they obviously had a right to remain silent, bearing on whether the briefcase had been abandoned at the time it was seen and seized by the customs agent. In the totality of this record, this was all beside the point. The District Judge found, and the record amply supports this finding, that the briefcase was, in fact, brought off the plane by one of the pilots. The customs agents had every reason to believe, and no reason to doubt, that this plane, transporting marijuana,

had landed after a flight from outside the United States, *United States v. Ingham*, 5 Cir., 1974, 502 F.2d 1287. All along, it was well known that the contraband was to come from Colombia. On the day the plane landed it was mentioned by one of the conspirators in the presence of the agent that the plane, enroute, would probably stop in the Bahamas. While the cargo was being unloaded in Sylvania, one of the men who had flown in with the plane volunteered that he had had a tiresome flight from Colombia and he wanted to get out of there.

The legality of the warranteless search of this briefcase by a customs agent is governed by what the Supreme Court said in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973):

> "For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search", 413 U.S. at 273, 93 S. Ct. at 2539.
>
> "That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."

United States v. Ramsey, 431 U.S. 606, 616, 619, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977).

Neither do we see any merit in the point that the briefcase was first taken by officers to a nearby town before being there broken open and searched by a customs officer. There is absolutely nothing to indicate that the briefcase had been tampered with in transit or that the discoveries would have been any different if the briefcase had been opened as soon as it was found.

The complaint about juror O'Neal being the husband of the trial judge's secretary is equally without merit. The record reveals that under voir dire questioning by counsel for one of the defendants Mr. O'Neal stated that his wife was "a secretary with this Court", that he did not feel that his wife "being connected with the Court itself would in any way influence [his] judgment about the evidence that would be presented". None of defense counsel pursued the subject but Mr. O'Neal was extensively questioned about his views and attitudes as a tobacco salesman. He was not challenged for cause and he was not peremptorily challenged. Counsel for the appellants were on specific notice of the status of the juror's wife and made no effort to have him excused. It is too late now to complain about this.

Appellants assert, as they did before trial in the district court, that the selection process for the grand and petit juries in the southern disttrict of Georgia violated the Constitution and 28 U.S.C.A. §§ 1861-1869, the Jury Selection and Service Act. We have carefully examined appellants' arguments on this issue and, for the reasons set forth below, find them without merit.

A. The Constitutional Challenge

In *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the Supreme Court stated that a defendant's sixth amendment right to a petit jury selected from a fair cross-section of the community is violated when there is a systematic disproportion between the percentage of a "distinctive" group in the community and its representation in venires from which juries are selected, unless the state shows that the aspects of the process that result in the disproportion manifestly and primarily advance a significant state interest, *id.*

99 S. Ct. at 668-71 and 670 n.26.[3] The Court clearly set out the elements of a prima facie violation of the fair cross-section requirement: the defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 668.

Appellant has alleged that the proportion of various groups responding to a jury service questionnaire and being placed on the qualified wheel varies to a constitutionally impermissible degree from the proportion of these groups in the community. We need not decide whether each of these groups is "distinctive" for purposes of a jury challenge[4] as we find that appellant has failed to make out a case of a constitutionally impermissible disproportion.

According to appellant's statistics, the disparity between the percentage of each allegedly "distinctive" group in the community and the percentage of that group either returning questionnaires or ending up on the qualified wheel is less than ten percent. The Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 208-09,

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[3] In *Duren* appellant challenged the procedures of a state in selecting venires. We assume, however, that the same analysis of disproportion applies when a violation of the sixth amendment by the federal government is alleged. In the present case no issue of a significant federal interest is raised so we need not decide whether that aspect of the analysis would apply in the case of a federal violation.

[4] Appellant argues, for example, that persons under the age of thirty who are eligible for jury service constitute such a group.

85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that underrepresentation by as much as ten percent did not show purposeful discrimination based on race. We recognize, however, that *Swain* was an equal protection case where purposeful discrimination must be shown and that the Court in *Duren* stated that a defendant need not show discriminatory purpose for a sixth amendment violation. The Court in *Duren,* however, discussed the statistical discrepancy needed to make out an equal protection violation along with its discussion of the disproportion that demonstrates a sixth amendment violation, 99 S. Ct. 670 n.26. Thus, while the Court stated that statistical evidence is used to prove *different elements* in equal protection and sixth amendment claims, it did not indicate that the necessary amount of disparity itself would differ. This Court in *Thompson v. Sheppared,* 490 F.2d 830 (5th Cir. 1974), *cert. denied,* 420 U.S. 984, 95 S. Ct. 1415, 43 L. Ed. 2d 666 (1975), upheld a system that resulted in an eleven percent disparity between the percentage of black people in the population and black people on the jury list. Appellant urges that we either find that an absolute disparity below ten percent violates the constitution or that we base our decision on data derived from other statistical methods, specifically comparative disparity or disparity in standard deviations. It is true that the Supreme Court in *Castaneda v. Partida,* 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), discussed disparity in standard deviations, but it seems clear to us that the Court in that case based its holding on an absolute disparity of 40 percent between the population of Mexican-Americans in the community and the percentage summoned for jury service, *id.* at 495, 97 S. Ct. 1272. In fact, the Court specifically noted that the actual disparities earlier accepted by the Court as adequate

for a prima facie case[5] had all been within the range presented in *Castaneda, id.* at 496, 97 S. Ct. 1272. This Court as well has referred to statistical methods other than absolute disparity,[6] but has never found a constitutional violation based on the data produced by such methods. Finally, the Supreme Court focused on absolute disparities in *Duren, supra.* Appellant argues that reliance on absolute disparity could elad to approving the total exclusion from juries of a minority that comprised less than ten percent of the population of the community. We need not, however, speculate here on how we would treat such a situation for all the groups analyzed in appellant's statistics comprise more than ten percent of the community.

In sum, we decline appellant's invitation to focus on comparative or standard deviation disparity and find that the absolute disparities shown do not make out a constitutional violation.

B. The Statutory Challenge

The statute itself declares that the ground for a challenge to jury selection procedures is "substantial failure to comply with the provisions of this title," 28 U.S.C.A. § 1867. This Court in *United States v. Davis,* 546 F.2d 583, 589 (5th Cir. 1977), *cert. denied,* 431 U.S. 906, 97 S. Ct. 1701, 52 L. Ed. 2d 391 (1977), stated, "Determining the substantial compliance question requires that the alleged violations of the Act be weighed

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[5] By our calculations, the actual disparities in the cases cited by the Court were 27.1%, 24.4%, and 19.7%.

[6] *See Berry v. Cooper,* 577 F.2d 322, 326 n.11 (5th Cir. 1978); *United States v. Goff,* 509 F.2d 825, 826-27 & n.3 (5th Cir. 1975), *cert. denied,* 423 U.S. 857, 96 S. Ct. 109, 46 L. Ed.2d 83 (1975).

against the goals of the statute." The Court identified the major goal of the statute as the random selection of juries from a fair cross-section of the community; toward that end voter lists are to be the primary source of jurors' names and disqualifications, excuses, exemptions, and exclusions are to be based solely on objective criteria, *id.* The Court then held that one aspect of the selection process there under review constituted a technical violation of the statute but that the violation in no way affected the random nature or objectivity of the selection process and did not constitute a substantial failure to comply with the statute. In *United States v. Goff,* 509 F.2d 825 (5th Cir. 1975), *cert. denied,* 423 U.S. 857, 96 S. Ct. 109, 46 L. Ed. 2d 83 (1975), this Court stated that to sustain a statutory challenge to grand jury selection procedures, a defendant must show the impact of an absolute disparity on the jury list. Specifically, although a group might be 47.73% underrepresented on a voter registration list, at most this disparity would result in 1.4 fewer persons on a twenty-three person grand jury than if the group's percentage of the population of the community (there 10.51%) were mirrored on a grand jury. This potential impact on a grand jury was held not to be so substantial as to require a supplementation of voter registration lists with other sources for grand jurors. *Id.* at 827.

As we read appellants' brief and the record, appellant alleges as statutory violations: (1) an allocation of grand jury seats among the divisions that did not reflect the population of those divisions and resulted in the underrepresentation of service workers and therefore of black people; (2) that the voter registration lists were an inadequate source of jurors because of a low rate of return of questionnaires (due in part to the absence of

voters' addresses), and that a supplemental source of potential jurors was required; (3) that the one-year district residency requirement is unconstitutional; (4) that the ministerial exemption or its application violated the first amendment; and (5) that the clerk and Administrative Office of the United States Courts usurped the function of the district judge in excusing jurors in violation of the statute. We treat these claims seriatim.

Appellants assert that one division in the district had three fewer seats on the grand jury than its population would warrant and goes on to speculate that black people had recently moved into this division and become service workers and were consequently underrepresented. They fail to show the impact of this alleged misallocation of seats on representation of the particular groups on the jury list. The government in its brief has shown that the alleged underrepresentation of the groups on which appellant focuses falls far short of the impact held insubstantial in *Goff, supra.* Brief for Appellee, at Appendix III.

Appellant cites two opinions of this Court for the proposition that voter lists must be supplemented when too few questionnaires are returned.[7] As appellee correctly points out, Brief for Appellee, at 50-51, both of these cases dealt with appropriate remedies for selection processes that had been found to be discriminatory. Subsection (b)(2) of 28 U.S.C.A. § 1863 specifically provides for selection of prospective jurors from voter registration lists adding: "The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the

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[7] *Broadway v. Culpepper,* 439 F.2d 1253 (5th Cir. 1971), *Berry v. Cooper,* 577 F.2d 322 (5th Cir. 1978).

rights secured by sections 1861 and 1862 of this title." *Id.* The law review article, cited by appellant, which advocates greater use of other sources states:

> At present only two federal district courts and several state courts utilize multiple lists and no court has either required multiple lists or supplemented a primary list on constitutional or statutory grounds. Most decisions require proof of purposeful discrimination in jury selection, even though constitutional and statutory authority indicates that proof of a significant disparity between the composition of the population and the source or pool constitutes a prima facie case of invalidity. Other cases require proof that the underrepresentation resulted in a 'substantial impact' on the absolute number of minority members serving on a panel. . . .

Kairys, Kadane & Lehoczky, *Jury Representatives: A Mandate for Multiple Source Lists,* 65 Cal. L. Rev. 776, 778 (1977). Responding to a statutory challenge to a grand jury, this Court in *Goff* found that in enacting the statute Congress

> felt that utilization of voter registration lists as the primary source of names for the master jury list would provide a more representative cross section of the community. That body recognized that in some instances, failure of particular groups in a community to register would mean that the voter registration list would not accurately represent a fair cross section of the community. But where, as in this case, the impact of the underrepresentation does not substantially affect the composition of the average grand jury, the Act does not require the district to incur the substantial expense and administrative inconvenience necessary to supplement the voter registration list.

509 F.2d 825, 827. In *Camp v. United States,* 413 F.2d 419 (5th Cir.), *cert. denied,* 396 U.S. 968, 90 S. Ct. 451, 24 L. Ed. 2d 434 (1969), appellant challenged both the grand jury and the array of petit jurors alleging that voter registration lists did not constitute a representative cross-section because a particular religious group did not register to vote. The court noted that the statute requires the use of voter registration lists under district jury plans, adding:

> Plans, if approved, may require supplemental sources if needed to assure a fair cross-section of the community. But the principal, if not sole, source is to be voter registration lists for random selection. Use of such lists as the sole source of names for jury duty is constitutionally permissible unless this system results in the systematic exclusion of a 'cognizable group or class of qualified citizens.'

Id. at 421. *See also United States v. Dangler,* 422 F.2d 344, 345 (5th Cir. 1970). Because we find that appellants have not shown either that the use of voter registration lists has a substantial impact on the composition of the average grand jury or that their use results in the systematic exclusion of a cognizable group from jury source, we find this claim to be without merit.

The statute itself, 28 U.S.C.A. § 1865(b)(1) requires that a juror have resided in the district one year. This Court upheld the constitutionality of this statutory requirement in *United States v. Perry,* 480 F.2d 147, 148 (5th Cir. 1973), and we do not agree with appellants' assertion that certain passages in *Duren, supra,* require a contrary holding.

We also find that the ministerial exemption as it exists in the local plan and as it was administered in the district, does not violate the statute or the Constitution. Section

1861 of the statute declares that it is the policy of the United States that all citizens have the opportunity to be considered for jury service and an obligation to serve when summoned. Section 1862 prohibits exclusion from jury service on account of, *inter alia*, religion. Subsection (b)(5) of section 1863 provides that a jury selection plan shall

> specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

The local plan for the Southern District of Georgia includes the following:

> EXCUSES ON INDIVIDUAL REQUEST
>
> This court finds and hereby states that jury service by members of the following occupational classes or groups of persons would entail undue hardship and extreme inconvenience to the members thereof, and serious obstruction and delay in the fair and impartial administration of justice, and that their excuse will not be inconsistent with the Act and may be claimed if desired and shall be granted by the Court upon individual request: (1) all ministers of the gospel and members of religious orders actively so engaged . . . .

Appellants urge that the effect of the administration of this exemption in the Southern District of Georgia was to exclude all Jehovah's Witnesses in violation of section 1862 of the statute and the establishment clause of the first amendment.

Appellants first assert that all members of the Jehovah's Witnesses sect consider themselves ministers. They urge that the standard for ministerial exemption (vocation not avocation) developed in cases dealing with military service applies here. They continue by noting that some persons who were excused as ministers did not list minister as their occupation in their jury questionnaire and that some of these people identified themselves as Jehovah's Witnesses. Finally they note that those who were excused as ministers but did not list their occupation as "minister" comprised 3.5% of all exclusions in one district. We find that granting ministerial exemptions to those who so request but do not list their occupation as minister does not, alone, constitute exclusion from jury service on account of religion. We further find that appellants have failed to show that the operation of the ministerial exemption in the Southern District of Georgia relieves all members of any particular sect of jury service, thus we need not reach appellants' first amendment claim. We further note that in *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969), *cert. denied*, 396 U.S. 968, 90 S. Ct. 451, 24 L. Ed. 2d 434 (1969), this Court rejected a challenge to the cross-section requirement based on grounds similar to the present claim. Appellant asserted that Jehovah's Witnesses do not register to vote and this Court upheld the use of voter registration lists noting that "those who do not choose to register to vote cannot be considered a 'cognizable group,'" *id.* at 421. In *United States v. Henderson*, 526 F.2d 889 (5th Cir. 1976), this court rejected a challenge to an exemption for "one man" businesses noting that the exemption was not automatic but based on individual requests and relying in part on the element of choice present in *Camp*.

Finally, appellants assert that their convictions be reversed because persons other than judges performed functions in excusing jurors, functions that the statute requires the district judge to perform. This Court dealt with a very similar claim in *United States v. Evans*, 526 F.2d 701 (5th Cir. 1976), *cert. denied*, 429 U.S. 818, 97 S Ct. 62, 50 L. Ed. 2d 78 (1976), and held that errors made by clerks determining excuses, exemptions, and disqualifications of potential jurors when, according to the statute, a judge should have made the determinations did not require reversing defendants' convictions as the clerk's errors did not constitute substantial failure to comply with the statute, *id.* at 704-07. It is true that in *Evans* nearly all the errors resulted in *inclusion* of persons who possibly should have been relieved of jury duty. While the record here does indicate that the clerk may indeed have made determinations that by statute the judge should have made, the appellants do not show that the clerk made *erroneous* determinations. Their allegations fall far short of showing a *substantial* failure to comply with the statute. We therefore find no basis for reversing the defendants' convictions on this ground.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5596

D.C. Docket No. CR-478-33

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, TONY DARWIN and JULIAN THOMAS PERNELL,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Before COLEMAN, Chief Judge, TJOFLAT and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same is hereby, affirmed.

January 4, 1980

Issued as Mandate: Feb. 25, 1980
(as to TONY DARWIN ONLY)

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

February 14, 1980

Gilbert F. Ganucheau
Clerk

Tel.: 504–589–6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-5596
U.S.A. v. Donald George Maskeny, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk

By: /s/ Claudia Nedes
Deputy Clerk

cc: Messrs. William H. McAbee, III
David Roberson
Ms. Katherine L. Henry

Mr. Carleton L. Weidemeyer
Messrs. J. Flowers Mark
John Mark
Messrs. John Kenneth Zwerling
Jonathan Shapiro
Messrs. Frank A. Mika
Arthur S. Meisnere
Mr. Donald G. Doddington
Mr. Roger V. Rigau

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5596

[Filed: Feb. 27, 1980]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, JOSEPH CHARLES BLACKBURN, SR., CHARLES MICHAEL CROCKER, KENNETH MURCHISON, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMS, TONY DARWIN and JULIAN THOMAS PERNELL,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

ORDER

The motions of all appellants, except Tony Darwin, for stay of the issuance of the mandate pending petition for writ of certiorari are GRANTED to and including March 15, 1980, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there

shall be filed with the Clerk of this Court the certificate of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ James P. Coleman
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Criminal Action No. CR 478-33

[Filed: Oct. 30, 1978]

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH CHARLES BLACKBURN, *et al.*
Defendant.

THE COURT having granted the Defendants permission to adopy the Jury Selection and Composition Challenge and the supporting testimony and documentation given in the *United States v. Lyons,* United States District Court, Southern District of Georgia, Brunswick Division, CR 277-12, and the court having been notified that the court reporter for said case, Mr. Craig Deloach, has not as yet provided transcripts of the evidentiary hearings thereto, it is hereby considered and ajudged that the time for filing and transmitting the transcript of the record on appeal be extended ninety (90) days from the original date of the appeal.

SO ORDERED this 30th day of October, 1978.

/s/ Alexander A. Lawrence
Judge,
United States District Court,
Southern District of Georgia

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Criminal No. 478-33

[Filed: Nov. 3, 1978]

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH CHARLES BLACKBURN, SR., *et al.,*
Defendant.

ORDER

Upon consideration of defendant's Motion for Incorporation and Memorandum in support thereof, and after having heard oral argument on said Motion, it is hereby:

ORDERED that the portions of the record in *United States v. Michael Thomas Smith, et al.,* Docket No. CR 278-40 (United States District Court for the Southern District of Georgia, Brunswick Division), and *United States v. Auvergne d'Antignac,* Docket No. CR 278-38 (United States District Court for the Southern District of Georgia, Brunswick Division), which relate to the challenges made to the grand and petit jury selection procedure be incorporated in the record on appeal in the above-captioned case upon the following caveat:

1. That the United States of America objects to and does not stipulate to those facts as applicable to the instant case;

2. That it appearing to the Court that the matters cannot be considered upon appeal inasmuch as they are not a part of the record; and

3. That such matters are hereby appended to the record solely for informational purposes with respect to the Grand and Petit Jury selection should the United States Court of Appeals for the Fifth Circuit desire such information.

/s/ Alexander A. Lawrence
Judge

Date: November 3, 1978